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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. .....

THE SHOTWELL MANUFACTURING COMPANY (RENAMED HOMAN MFG. CO., INC.), A CORPORATION, BYRON A. CAIN AND HAROLD E. SULLIVAN,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The Shotwell Manufacturing Company (renamed Homan Mfg. Co., Inc.), Byron A. Cain, and Harold E. Sullivan pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Seventh Circuit entered in the above case on February 8, 1961.

OPINIONS BELOW.

Since the case has an unusual history, having been in this Court and remanded for additional proceedings, we list prior relevant opinions, as well as those sought to be reviewed:

Original opinion of the Court of Appeals reversing convictions because evidence was used against defendants, in violation of the 5th Amendment, which had been obtained from them by promises of immunity is reported at 225 F. 2d 394.

This Court's opinion remanding for further proceedings is reported at 355 U. S. 233.

The opinion of Judge Nordbye upon the remanded proceedings finding no perjury in the original disclosure testimony but resulting in re-sentences is not reported and is printed as Appendix A hereto.

The opinion of the Court of Appeals for the Seventh Circuit affirming the new judgments of conviction is reported at 287 F. 2d 667, and is printed as Appendix B, hereto.

The opinion of Judge Nordbye with respect to jury selection procedures is not reported and is printed as Appendix C hereto.

JURISDICTION.

The judgments of the Court of Appeals were entered February 8, 1961, and a petition for rehearing, filed within the period allowed by the Court of Appeals, was denied on April 11, 1961. On April 27, 1961, by order of Mr. Justice Clark, the time for filing a petition for certiorari on behalf of petitioners was extended to and including June 9, 1961. Jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1).

QUESTIONS PRESENTED.

Background:

Defendants, in early 1948, *it now has been found*, in reliance upon repeated promises of immunity from criminal prosecution extended to those who would voluntarily disclose income tax irregularities before Internal Revenue initiated investigation thereof, informed an appropriate

revenue official, Sauber, that Shotwell Manufacturing Company had received substantial unreported income from one Lubben in 1945 and 1946 of which it had no accurate records. At the request of Sauber and in reliance on the promised immunity, defendants thereupon prepared and submitted to the Treasury voluminous "recapitulations" or reconstructions of the Lubben account, which, to avoid controversy, were made to square with the "exaggerated" amounts Lubben claimed he had paid rather than to show the true approximate amounts which were materially lower.[1] These "recapitulations," which thus "admitted," *for purposes of gaining immunity and commencing a civil investigation*, receipt of more than had been paid, were received in evidence against defendants, when, despite the promised immunity, they were indicted and tried for evasion of a portion of Shotwell's taxes for 1945-6. Samples of some of the documents appear as Appendix D. They were used as affirmative evidence of the amount of gross income involved and were, as the Government asserted on the first appeal, one of the "two legs" on which the convictions depended. Defendants were held guilty.

In June 1955, the Court of Appeals discussed the facts fully and accurately and held (a) that although a timely voluntary disclosure had been made, the promised immunity from criminal prosecution could not be enforced judicially, but (b) evidence induced from defendants by such promises of immunity should have been suppressed.

The Government petitioned for certiorari in October 1955.

In December 1955 and June 1956 the Government, by letters to this Court, asked it to withhold action on the

1. The difference is now conceded by the trial judge to be close $150,000, see p. 12, *infra*; we contend it was even greater. Cf. 355 U. S. at 238, Note 10.

certiorari petition pending further investigation which it was asserted would show that no disclosure had been made until after Revenue had commenced investigation. In April 1956 this investigation was committed to a special grand jury.

A motion to remand was filed here in October 1956 by the Government on the general ground that the reinvestigation showed no disclosure had been made until long after defendants claimed. It was supported not by witness affidavits but principally by those of Lester Stein of the Treasury, and Vincent P. Russo, attorney in charge of the grand jury inquiry, purporting to recite facts developed in the reinvestigation. The Russo affidavit asserted (contrary to what has now been established, App. 1761), "* * * it appears that prior to June 21, 1948 * * * no disclosure, voluntary or otherwise, had been made."

However, the fact was the principal witnesses, Huebner, Graflund and Lima who ultimately were relied on by the Government and whose subsequent affidavits are digested by this Court's opinion in 355 U. S., had been interrogated repeatedly during the first half of 1956 and had testified at length before the new grand jury in July and August 1956. Their testimony *at that time*, as hereafter shown, was at wide variance with the theories suggested in the December 1955 letter to this Court, with the allegations of the Stein and Russo affidavits, and in large part extremely helpful to defendants. *The motion to remand concealed that fact and this evidence was suppressed.* This Court was given no inkling of it. (The facts came to light on the new hearing ordered by this Court when defendants insisted on production of witness statements under the rule of the *Jencks* case, and, after establishing remarkable impeachments thereby, insisted on production of the relevant grand jury minutes which displayed the sworn testimony the prosecution had concealed and proved further shocking impeachments and drastic changes of prosecution

testimony during the long period this Court had been induced to hold the case in abeyance.)

In December 1956, the Huebner affidavit, digested in this Court's opinion, and much stronger than his grand jury testimony, was filed; in August 1957 the Graflund affidavit, strikingly contrary to his grand jury testimony of a year earlier, was filed. No affidavit from Lima was filed although strong representations, contrary to Lima's 1956 grand jury evidence, were made as to what he would testify on a further hearing.[2]

At no time was this Court advised that these witnesses, wholly under Government control, had testified to the precise contrary of the affidavits ultimately filed here or that the story finally told in their affidavits *came into existence only during the period this Court was induced to hold the case so that the witnesses might be further interrogated.*

The Government's ultimate position in this Court was that defendants' contention that a voluntary disclosure had been made prior to June 21, 1948 was pure fabrication. If that position had been correct it would have followed (on counsels' incorrect theory that June 21, 1948 was the "timeliness" date for a voluntary disclosure), that defendants did not prepare and surrender incriminating material in reliance on the promises of immunity for defendants knew that once an investigation had been independently initiated by the Treasury the promise of immunity was no longer extended.

This Court, because of the Government's claim of perjury on behalf of defendants, held the case presented "an unusual question involving the integrity of a criminal trial in the federal courts" (355 U. S. at 234) and stated the dilemma that it was "plain that either the testimony in the District Court [that a disclosure had been made before June 21, 1948] was untrue or these affidavits [tendered in support of the motion to remand] themselves are the

2. See 355 U. S. at 240, Note 15.

product of fraud." By a divided opinion, the case was remanded to the District Court for further proceedings to determine the truth of the disclosure claim. The majority of the Court expressed the view that the constitutional question as to use of incriminating evidence obtained by promising immunity should not be passed on until the question as to possible "taint" of the record had been resolved (See 355 U. S. at 241 and Note 3).

Judge Nordbye, on remand found that the disclosure *was* made before investigation was initiated (App. 1761) and the Government concedes the disclosure was timely. (Ct. of Appeals decision, note 3.)

The following questions are presented:

1.

Whether the admission in evidence of documents and information furnished by petitioners in reliance on the Government's promise of immunity from prosecution violated petitioners' rights under the Fourth and Fifth Amendments and the common law rule excluding incriminating material induced by such promises?

2.

Whether criminal justice and the processes of this Court were abused and a fraud worked on the court by inducing it to delay action for nearly a year and ultimately to remand the case by the device of concealing that the witnesses whose affidavits were finally filed (and one from whom testimony was promised) had repeatedly sworn to the contrary before, or while, the motion to remand was pending and changed their testimony only after being subjected to repeated interrogations, "refresher courses" and other sophisticated forms of pressure by Government agents?

3.

Whether it was either a denial of due process or a violation of civilized standards of administration of justice for the District Court to re-enter judgments of conviction after the Court had found on the reopened hearing that the principal witness for the Government on the original jury trial (Lubben) had given seriously false testimony to the jury on a vital issue?

4.

Whether petitioners had to show they were "actually prejudiced" by illegal jury selection procedures utilized in selection of the arrays of both the indicting grand and the petit jury by which (a) jurors were selected from the private list specifically condemned in *Glasser* v. *U. S.*, 315 U. S. 60, as well as other private lists, and volunteers were accepted contrary to the Illinois statute, and (b) the Jury Commissioner delegated his non-delegable duty of selection of prospective jurors to an employee of a private corporation of which the Commissioner was president?

5.

Whether the jury could be instructed it might consider evidence against Sullivan which had been ruled inadmissible as to him and instructed that the disclosure was defective?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Constitution of the United States, Amendments 4 and 5.

28 U. S. C. (1952 ed.) Secs. 1861, 1864 (Jurors).

Illinois Revised Statutes 1951, Chap. 78, Sec. 13 (Jurors).

(Texts are shown in Appendix H hereto.)

STATEMENT.[3]

The District Court's opinion is so discursive *as to the merits of the tax case*, that the salient result of the new hearing is obscured — the Government's own evidence showed that the disclosure, whether perfect or imperfect, had been made just as had originally been testified.

Neither the District Court nor the Court of Appeals opinions recite the facts as to how this Court's order of remandment was obtained—hence a longer "Statement" than is usually desirable is required. Neither addresses itself to the specific issues meticulously listed or classified in Justice Harlan's opinion at pages 239-240 of 355 U. S. And, as both opinions show, in becoming involved in the merits of the tax case and details of the former "voluntary disclosure policy", both courts lost sight of the larger constitutional question as to whether incriminating evidence obtained from a defendant under the inducement of promising him immunity may be used against him in a federal criminal trial.

No Perjury in Original Disclosure Testimony.

The District Court did not find that a syllable of perjury was given on the original proceeding as to when and how the disclosure was made; he found the disclosure *was* made, as defendants had claimed, before the Treasury commenced

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3. The record as certified by the Clerk of the Court of Appeals to this Court includes the following:

a. The printed record on the original appeal (terra cotta colored), which was reprinted by the Government in connection with its appeal in 355 U. S. 233. References to it will be shown as R. .....

b. A printed appendix received in evidence by the District Court in a proceeding entitled *Sullivan* v. *U. S. District Court*, which was accepted as part of the record here and which contains some of the evidence relating to jury selection procedures. References to it will be shown as S. .....

c. The printed appendix containing the testimony taken in the 1958-9 reopened proceeding before the District Court. References to it will be shown as App. .....

investigation. But he found it defective or "fraudulent" *because it did not square with what he believed to be the merits of the tax case.*

The new hearing, rather than being confined to examination of the charge that no disclosure had been made in early 1948, was permitted, over repeated objections (App. 195-6, 208, 263, 273-80, 303, 391-411, 543-7, 567, 573, 1028, 1781) to cover the entire alleged course of dealing between Lubben and Shotwell throughout 1944-5-6.[4] This was the merits of the case, went far beyond this Court's limited remandment and embraced fields of investigation which, if proper at all under the indictment, were only for a jury in a new trial. The prosecution endeavored to show that some of Lubben's black-market payments to Shotwell were not disbursed by it for corn but went to Cain and Sullivan personally. Whether the money actually was spent for corn or was disbursed as so-called "constructive dividends" would make no difference in Shotwell's taxes, for neither type of expenditure was recognized as deductible in 1948. In substance, on the reopened hearing Cain and Sullivan were put through a bench trial on an alleged crime for which they had not been indicted—personal tax evasion—and found guilty.

In opening up the entire case the Government showed that the original 1953 jury convictions had been obtained by monumental perjury by its star witness, Lubben, on

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4. Shortly after the order of remand the District Court expressed the remanded issue as follows:

> "Of course, the ultimate fact is, I take it, whether the voluntary disclosure was made in July or August of 1948 or whether it was made in March, 1948. That is, after all, the ultimate issue, is it not?" (App. 200.)

However, the District Court did not adhere to that view. The prosecutors took the position that they could question Huebner

> "• • • about *everything that happened in his transactions with Lubben.*" (App. 572.)

The trial court sustained that position and the hearing on remandment became, as the District Court's opinion clearly indicates, a virtual re-trial of the case on the merits.

whose testimony the jury verdicts depended. The District Court did not use the word "perjury" in describing Lubben's 1953 testimony but the more polite term, "exaggerated"; but the "exaggeration" was too great to be inadvertent. The District Court, in 1959, found that Lubben's testimony to the jury was not, as the District Court erroneously had believed in 1953, "sincere" and "truthful" (R. 3018), but was "exaggerated" (App. 1758) to the extent of approximately $132,000 on the gross amount involved (See p. 12, *infra*). It thus is now undisputed that defendants were convicted by the jury on materially false evidence — evidence which the Court specifically found that the jury in 1953 believed was true (R. 3073).

The trial court, in 1959, found in substance that although Lubben lied to the jury, nevertheless he still paid Shotwell more, *in the judge's 1959 estimation*, than Shotwell had expended in over-ceiling premiums for raw materials; the balance, whatever it might be, *the judge believed* was pocketed by Huebner, Sullivan and Cain. The defendants, in his view, were guilty of "fraud" because they did not disclose these alleged individual diversions when they made the disclosure on behalf of the corporation. "A dishonest and false disclosure [in the trial court's view] cannot be held to be a timely voluntary disclosure" (App. 1771). The disclosure was "dishonest" and "false", according to the trial court, even though timely and even though it revealed every dollar, indeed more, of gross income that Shotwell received and invited assessment on that basis, solely because it did not reveal the supposed facts that Huebner,[5] Cain and Sullivan each got money as "constructive dividends", al-

5. Huebner, plant manager, was the man who physically received most of Lubben's over-ceiling payments and who disbursed the funds for Shotwell's over-ceiling premium payments for corn. He admits that in the process he personally kept about $45,000. Some of this he claims was with the knowledge of Cain and Sullivan—some he admits he took secretly. He has been given probation.

though such facts (which Cain and Sullivan strongly deny as to themselves) would not have affected Shotwell's taxes.

Although the District Court finds defendants guilty of fraud; the "fraud" the District Court talks about *is as to what he believes were the merits of the tax case, and the duty he believes the individuals were under, on his view of the facts, to inform on themselves when making the disclosure on behalf of Shotwell. The District Court* DID NOT FIND *that the testimony of Busby, Sauber and defendant Cain in which this Court was so vitally interested was a perjurious fraud.*

Incriminating Material Which Was Surrendered Upon Promises of Immunity.

The Treasury's so-called "Voluntary Disclosure Policy," which promised immunity from criminal prosecution for those who would voluntarily disclose tax irregularities before independent investigation was initiated, was in force for many years prior to 1952 when it was abandoned. (See 355 U. S. 233, Note 2.) Statements of the Policy are appended hereto as Appendix F.

The method in which the disclosure was made is accurately summarized in the first Court of Appeals opinion herein: in brief, Shotwell's auditor, Busby, first went to Chief Deputy Collector Sauber and opened the matter without revealing the name of the taxpayer; in a short time he took Cain with him and revealed the name of the company; Sauber told them to assemble what information they could to construct an account of the over-ceiling transactions. (On remand Judge Nordbye held this was the precise fact. App. 1761.) By that time defendants were aware of three important facts: *first*, they could get no credit, or deduction, for money Shotwell had paid out in over-ceiling premiums for raw materials—Shotwell was going to be taxed on whatever the Treasury believed the

gross amount of Lubben's over-ceiling payments to it had been; *second*, Lubben had purported records which showed he had paid far more to Shotwell than was the case; *third*, in making its assessment, the Treasury would ascertain Lubben's version of the transactions. Accordingly, unless petitioners were willing to become involved in a controversy, which might become public, as to whether their version, or Lubben's, was correct as to the amount of their over-ceiling receipts, they had to place their figures in substantial agreement with Lubben's.

What Lubben's precise figures were has always been doubtful because his alleged records were incomplete and, *as established by Government witnesses on the remanded hearing*, had been "doctored" by one Tobias who, after leaving Lubben, *was hired by Internal Revenue and worked on this case* (App. 969). Government counsel asserted before Judge Nordbye that Lubben proved $454,000 on the jury trial for the years 1945-6. Judge Nordbye now finds Lubben's claims to the jury were "exaggerated" and that the probable amount was "between three and four hundred thousand dollars," including $28,000 for 1944. If one takes the median figure of $350,000 and subtracts the $28,000 for 1944 (which was not involved in the jury trial), it follows that Lubben "exaggerated" to the extent of some $132,000. By raising no controversy, in the disclosure, as to Lubben's "exaggerated" figures Shotwell charged itself with receiving a very large amount of "overages" that had not in fact been paid by Lubben. Government witnesses on the new hearing proved that "Cain said to put everything in those figures that he [Lubben] could say he paid us money on" (App. 797-800; 967-8, 1063); the purpose was to have Shotwell's recapitulations "tie into" and "jibe" with Lubben's papers (App. 1245-6). The photostat copies appearing as Appendix D show how the right hand columns purporting to show the overages, were stated on their face to be based on Lub-

ben's purported records. The result was that the "Receipts" shown for each year on the "Summary" sheet (the first photostat) were seriously overstated. As a consequence the *disbursements* were overstated *but the latter overstatement, as the law was then applied by the Treasury, was without tax significance.*

Despite the foregoing undisputed history, and the fact that these papers had been procured by promising immunity, they were received in evidence and were strongly relied on by the Government, *so far as their "receipts" portion is concerned, as being true and incriminating.*

These papers sealed petitioners' fates before the jury for they supported Lubben's false testimony as to the amount of gross income Shotwell had received, while petitioners could support only a portion of the disbursements shown thereon. Although Judge Nordbye finds that the *disbursement* portion of the papers, because *in part* fictitious, were prepared in "bad faith", he does not dispute that they were procured by promises of immunity.

The Steps Leading to the Reopened Hearing and Concealment of Evidence from This Court.

A Special Assistant to the Chief Counsel of Internal Revenue Service became concerned with this case in the spring of 1955 while it was pending in the Court of Appeals on the first appeal. Conferences within the Treasury "gave rise to the strong *suspicion* that the alleged disclosure *might not* have taken place in March, 1948." "Inspectors" were assigned to investigate (See Stein affidavit attached to Motion to Remand (Amended), p. 9, App. 198-9).

On November 8, 1955, Treasury inspectors interviewed Graflund, who, as Shotwell's comptroller in January 1948, had alerted its outside auditor, Busby, to the black-market transactions with the result that Busby promptly advised that a disclosure be made. Graflund, when re-interviewed

in November 1955 gave no information contrary to his original testimony or to the foregoing facts but volunteered that he felt he "owed the Department something" because he had not been indicted in 1952 along with the others (App. 1110-11). Revenue Agent Lima was reinterviewed on August 10, 1955 (App. 1418) and gave no evidence showing that a disclosure had not been made. Huebner, who ultimately went over to the Government, does not appear to have been contacted in 1955. Nevertheless, on December 1, 1955, Internal Revenue wrote to the Justice Department asserting that its investigation had developed "newly discovered evidence * * * *in direct conflict*, with the testimony of witnesses Busby and Sauber and the defendant Cain" as to the disclosure. If Internal Revenue had such evidence no one yet knows what it was because *no such evidence "in direct conflict" has yet seen the light of day*. On December 6 the Department of Justice transmitted that letter to the Clerk of this Court, requesting the Court to withhold action and promising a motion to remand. The Court withheld action.

On May 10, 1956, Graflund was further interrogated by Mr. Russo (in charge of the grand jury investigation) and assistants. Instead of the lurid story Graflund finally gave (August 17, 1957) in an affidavit for this Court to the effect that Busby knew nothing of the black-market transactions until *July* 1948, *Graflund, in May 1956, said he revealed the transactions to Busby on a train trip from New York in January 1948 and didn't "spare the horses in the telling"* (App. 1125-8). In August 1956 Graflund was taken before the grand jury and in exhaustive testimony that went entirely beyond Busby's fairly terse original evidence (R. 170, 211-2, 1827, 1829), repeatedly swore that he revealed the facts to Busby in the club car of the Twentieth Century Limited in *January*, 1948 (See Appendix E, *infra*). This fully supported the original testimony as to the disclosure and the subsequent slow process of assembling figures for reconstruction of the Lubben account.

Revenue Agent Lima was interrogated in at least 9 lengthy sessions between 1955 and 1957. Prior to filing of the motion to remand Lima was put through a 2 day session in Washington on August 9 and 10, 1955 (App. 1420); a session extending approximately a week in March or April 1956 (App. 1432); grand jury testimony on July 26, 1956 after several days of "refresher courses" (App. 1437); a lie detector test on October 4, 1956 (App. 1441); and more grand jury testimony on October 8, 1956 (App. 1464). In none of those sessions did Lima give any evidence that he had filled out and then destroyed a Revenue Agent's report or that he knew anything about a $20,000 proposed settlement (App. 1420, 1440, 1443-50, 1465-67, 1477-9) and in all of his statements, and his testimony on remand, admitted he got petitioners' papers as part of a voluntary disclosure. (This is contrary to the representations subsequently made here. See note 15, this Court's opinion.) On October 4, 1956, when subjected to the lie detector test, Lima told the operator he "had been interrogated so much and had given so many statements that [he] had trouble regalling what was in [his] mind and what [he] had learned from other sources or heard or had been asserted to [him]" (App. 1450-1, 1455-6). Lima was told it was possible the new grand jury might indict him and was worried that he might be fired (App. 1484, 1523-4, 1530).

During the summer of 1956 defendant Huebner was working secretly with the prosecutors and was interrogated "many, many times" (App. 715).[6] On August 26, 1956,

6. Huebner did not discharge his counsel of record for more than six months after he actually began "co-operating" with the prosecutors (App. 746). Not once before the masquerade was discovered did the prosecutors tell Huebner they couldn't deal with him behind the back of his attorney of record, or that "If all you are doing is telling the truth and being an honest citizen, you don't have to sneak around about it, you can tell Christensen, Cain, Sullivan and everybody else. You don't have to play a dual role." (App. 718, 743, 746.)

Huebner solemnly said he had no recollection of any asserted meeting at the Chicago Athletic Club supposedly to discuss the purchase of Lubben's company in order to get possession of his records (App. 854) as Huebner subsequently "remembered" in his affidavit of December 19, 1956 for this Court and as the Russo affidavit of September 19, 1956 told this Court had taken place.

Thus, in October 1956 when the motion to remand was filed, the reinvestigation had continued for a year and a half; six months of that time with the powerful aid of a grand jury. The Treasury had no real evidence to validate its ill-founded "suspicion" that the disclosure had not been made as originally testified to. The sworn evidence it had developed tending to verify the original disclosure testimony was withheld from this Court and the motion to remand was filed, backed by the hearsay affidavits of Stein and prosecutor Russo. No doubt the Solicitor General felt those affidavits were entitled to credence and was unaware of the suppressed testimony.

In the face of the suppressed testimony, and of the original sworn, unrecanted testimony of Busby, Sauber and defendant Cain, Mr. Russo represented in sweeping fashion,

> "From statements of fact within the personal knowledge of witnesses interviewed and interrogated by me, and from facts and circumstances already in the record, it appears that prior to June 21, 1948 * * * no disclosure, voluntary or otherwise, had been made by Busby and Cain to Sauber or to any other official or employee of the Revenue Service."

Meantime, while the matter continued to pend here, the witnesses were ceaselessly pursued, sometimes separately, sometimes in joint sessions which Lima characterized as "refresher courses" (App. 1382). Lubben was brought in from Puerto Rico for a joint session with them (App.

1205). To paraphrase from *McNabb* v. *U. S.*, 318 U. S. 332, 338, "It took [until February, 1957] to get a story that was satisfactory * * *."

The Importance of the Concealed Testimony and the Collapse of the Government's Remanded Case.

The matter can only be sketched in a petition for certiorari but this is clear:

Outstanding in the charges made to this Court was the charge that Shotwell's comptroller, Graflund, had not revealed the black-market facts to outside auditor Busby in January 1948 as Busby originally had testified but had done so only in late June 1948, after, so it was incorrectly asserted,[7] the Treasury had independently initiated investigation. *If* that charge was true, it meant that defendants' entire factual claim of a disclosure fell of its own weight, for defendants had always asserted this was the starting point; they had offered no other explanation of how they came to make the disclosure. On the other hand, if Graflund in fact did reveal the facts to Busby in January, the subsequent events, including Busby's advice to disclose, followed in logical, sequential and convincing fashion. The point was pivotal. Destruction of the January revelation by Graflund to Busby was crucial if the Treasury wished to destroy defendants' version of the disclosure and to validate its "suspicion" that one was not made until much later than Busby, Cain and Sauber had testified. Judge Nordbye, on remand, upheld the original testimony. He found, although the Court of Appeals overlooked the finding,

> **"* * * my appraisal of the evidence leads me to the conclusion that it is very probable that Graflund did mention to Busby something about the black-**

7. See our "Answer to Motion to Remand" in the original proceedings in this Court, Note 3 and pages 19-23.

> **market payments of Lubben to Shotwell when they were on the train together in January 1948.''** (P. 43, *infra.*)[8]

The Graflund debacle on the stand, the brain-washing he had been subjected to, was so evident, that we submit as Appendix E hereto an excerpt from his cross-examination in which he attempted to describe his conversion.

The second pivotal charge is that Busby did not go to Sauber until *after* June 21, 1948. Judge Nordbye found:

> **''* * * my view from all the evidence is that it is fair to find that Busby did visit Sauber about Shotwell's taxes some time before'' Revenue Agent Krane's visit of June 21, 1948.** (P. 44, *infra.*)

Finally, in the Court of Appeals **''government counsel expressly stated that the disclosure was timely.''** (P. 56, Note 3, *infra.*)

Also outstanding was the charge to this Court that Huebner had wanted to testify on the original proceedings but had been kept off the stand because he threatened to tell the truth. This charged a conspiracy for subornation of perjury. It was a charge that should not have been made unless the prosecutors were prepared to back it to the hilt. Certainly this Court must have assumed the prosecutors made it in good faith and were prepared to back it. ***Yet when the new hearing was held the prosecutors did not offer a syllable of proof in support of that deadly charge but utterly abandoned it.***

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8. This important finding is inexplicably omitted from the Court of Appeals' recital of the facts. The Court of Appeals quoted the District Court's discussion of Graflund's testimony down to the point where the District Court announced his conclusion quoted above, *but omitted the all important conclusion.* It is clear that Judge Schnackenberg seriously misapprehended the record for his opinion conveys an impression quite contrary to Judge Nordbye's actual finding.

The Jury Selection Procedures.

The grand jury which reinvestigated this case returned another indictment against petitioners in February 1957.[9] Defendants in that case filed motions challenging the composition of that indicting jury. A hearing was held therein before Judge Barnes in June 1957 which showed that the methods used to obtain the 1956 jury had been in effect when the 1952 grand and 1953 petit juries were drawn here. Petitioners moved to withdraw their pleas of not guilty in this case for the purpose of filing an amendment to their motion to dismiss the indictment herein because of the illegality of the juries here. That motion originally was denied on the ground that this case was then pending here (App. 16-17).

After this Court's decision defendants renewed the matter (A. 1111-1114). On a hearing with respect thereto it was stipulated that Judge Nordbye should consider the testimony taken in the other case (App. 313), and an affidavit of the Clerk of the Court (App. 313-4). The evidence showed without dispute:

1. In selecting prospective jurors the Clerk (a) selected names from membership rosters of several private organizations, including the identical League of Women Voters' list, which this Court specifically held in *Glasser* v. *U. S.*, 315 U. S. 60, should *not* be used, (b) accepted "volunteers," (c) accepted nominations by former grand and petit jurors (S. 127-215). About 60% of those selected by the Clerk were nominees of former jurors and 20% were volunteers.

2. Former Jury Commissioner Crooks entirely abandoned his non-delegable duty of selection to one Richard Jongsma, an employee of a corporation of which Crooks was president. The Commissioner was wholly unable to say how the persons supposedly, but not actually, selected

9. That case has never been brought to trial.

by him were selected (S. 227, 228, 235, 236, 242). As Mr. Crooks put it, "*He [Richard] does all the work and I take all the honor if there is any*" (S. 229). Crooks could not say that he personally read a single one of the questionnaires sent to the prospective jurors (S. 233). Jongsma read the questionnaires returned by prospective jurors and Jongsma determined those to be selected (App. 338-39). The trial court held (App. 438) that all that Mr. Crooks delegated were routine ministerial duties. *There is no evidence to support that finding.* In the Court of Appeals petitioners challenged the Government to cite any substantial evidence that would support it. The challenge was not accepted and the Court of Appeals opinion ignored the point. The Solicitor General's Brief in Opposition here will point to no substantial evidence warranting that finding.

REASONS FOR GRANTING THE WRIT.

1.

The Court of Appeals has hold that incriminating documents and information, induced from defendants by promises of immunity from criminal prosecution, may be used against them as "admissions against interest", and that this is true even though defendants, believing they were achieving immunity, expanded or exaggerated their "admissions" to fit what have been found judicially to have been "exaggerated" claims concerning them. So startling a holding, *unsupported by any prior authority, state or federal, reversing the Court of Appeals' initial view, and made in a case which this Court sent back for further consideration of whether the evidence should be suppressed,* takes on added importance and will have a profound effect upon federal criminal law in view of the observation in Justice Black's opinion herein that the point was heretofore unsettled.

Reduced to lowest terms, the District Court and the Court of Appeals on remand held that because Shotwell's figures as to *outgo* were in part fictitious they were fraudulent, and therefore the figures as to *income*, although also in part fictitious, could be used against defendants *as true*. Or stated another way, if *part* of a confession given under a promise of immunity is false *in favor of a defendant*, the confession may be introduced against him.

This is a wholly novel and pernicious doctrine. It ignores the common law theory that confessional material obtained by promise of immunity is inadmissible for the very reason that the confessor, to obtain immunity, is apt, as here, to confess things he did not do. (See *Wigmore, Evidence*, 3rd ed. Secs. 821-867). It is squarely contrary to this Court's holding in *Rogers* v. *Richmond*, 365 U. S. 534, 543, that a legal standard as to admissibility which takes "into account the circumstance of probable truth or falsity" of confessional material is impermissible under the Due Process Clause.

The impact of the present decision is heightened because it is a reversal of the first Court of Appeals decision which said (225 F. 2d at 406):

> "The evidence thereby obtained by the Government [through promises of immunity] stands on the same footing as an oral or written confession induced by such a promise. The use of such evidence in the trial was a violation of each defendant's privilege against being compelled in a criminal case to be a witness against himself as guaranteed by the Fifth Amendment . . ."

That holding squared with what had been understood to be constitutional doctrine and was in accord with the holdings as to voluntary income tax disclosures in *White* v. *U. S.*, 5 Cir., 194 F. 2d 215 (c. d. 343 U. S. 930); *Briggs* v. *U. S.*, 6 Cir., 246 F. 2d 40; *Monroe* v. *U. S.*, 5 Cir., 215

F. 2d 81; *Lapides* v. *U. S.*, 2 Cir., 215 F. 2d 253; *In re Liebster*, 91 F. Supp. 814. Cf. *State* v. *DeCola*, 33 N. J. 335, 352-3; 164 A. 2d 729.

The relevant considerations were stated, but not decided, by Mr. Justice Black when this case was first here (355 U. S. at 247):

> "I think the Fifth Amendment questions raised here are important, unsettled and not susceptible to offhand resolution, particularly with respect to incriminating evidence which the defendants actually turned over to the Government in hope of securing immunity from prosecution. In *Bram* v. *U. S.*, 168 U. S. 532, 542-543, the Court referred with approval to the rule that 'a confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence . . .' In accord with this statement it appears to have been generally assumed in this Court that the Fifth Amendment bars the use against a defendant in a criminal prosecution of confessions or admissions secured from him by promises of immunity. (Citing cases.) And so far as I can tell this Court has never considered whether lack of good faith deprives a suspect of the Fifth Amendment's protection when he makes disclosures under a promise of immunity, or under just what circumstances and to what extent this might be true."[9]

Neither the opinion of the District Court nor that of the Court of Appeals upon remand discuss the constitutional questions. However, the present decision does not stand alone. The first decision, the decision of this Court and the second decision of the Court of Appeals will be read together to ascertain what the "Shotwell doctrine" as to evidence obtained by promises of immunity is—and that

9. It should be noted that although the foregoing is found in a dissenting opinion, it was not in opposition to anything in the majority opinion.

doctrine, unless certiorari be granted, is that the constitutional inhibition found in the first opinion does not exist.

The constitutional inhibition was evaded solely on the basis that the so-called "washout payments" shown on defendants' documents were, in part, fictitious, from which it was concluded that petitioners were not entitled to suppression of partially false exhibits.

The opinions are understandable only as an endorsement of a legal standard for admission or exclusion "which took into account the circumstance of probable truth or falsity," a standard which this Court condemned in *Rogers* v. *Richmond*. In *Rogers* the Connecticut courts had implied that if confessional material was secured under circumstances tending to indicate the probability that it was false, it would be *in*admissible. Contrariwise, in *Shotwell* the lower courts have held that if the material was probably false it is *ad*missible, even though this Court in *Rogers* said the Constitution poses "a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth" (365 U. S. at 544).

If the decisions below mean, as they certainly will be construed, that if petitioners acted with impure motives in responding to the promise of immunity, whatever they produced may be used against them, then they create, as Justice Black's observations herein point out, a Constitutional test, or escape from the Constitutional prohibition, not heretofore found in the books. The question has been decided in England, where it was squarely held that a taxpayer's lack of good faith in presenting false documents under the English voluntary disclosure doctrine with the specific intent of reducing the tax liability did not prevent suppression. *Rex* v. *Barker*, 2 K. B. 381 [1941].

The courts below have overlooked that petitioners' voluntary disclosure raised two distinct questions—*First*, was the promised immunity enforceable? *Second*, could evi-

dence surrendered in reliance on the promise be introduced against defendants even if the disclosure was defective and the Government was free to prosecute by the use of other evidence? Petitioners raised these points by separate motions. The first was one to dismiss the indictment (R. 10, 612), the second to suppress (R. 120). The latter was based specifically on the Fourth and Fifth Amendments.

Although we assert that petitioners fully complied with the Treasury's voluntary disclosure invitations and should have been granted the promised immunity, it does not follow that because it is held that petitioners, *after making the disclosure*, did not sufficiently comply with the policy by furnishing all information they could have, or failed to comply by giving assertedly false information, that the Government may use evidence which it obtained by the promise of immunity. The opinions below overlook the fact that the Treasury, by attaching conditions to its "voluntary disclosure policy", could not attach conditions to, or limit, the unconditional prohibition of the Fifth Amendment against the reception in evidence of material obtained by promises of immunity, nor the prohibition of the Fourth against procuring papers and documents by stealth and artifice. (*Fraternal Order* v. *U. S.*, 3 Cir., 5 F. 2d 93, 94; *Gouled* v. *U. S.*, 255 U. S. 298, 304.)

If *Bram* v. *U. S.*, 168 U. S. 532, no longer states the law, and if *Rogers* v. *Richmond* has qualifications, such fact should rest only upon a decision by this Court. The important constitutional question which the majority felt was not ripe for decision when the case was first here has now been placed in such focus that it should be settled, for the trilogy of the first Court of Appeals opinion, then that of this Court, and finally the second Court of Appeals opinion makes devitalizing inroads into basic guarantys of the Bill of Rights.

2.

This Court granted the unusual motion to remand because the Government's allegedly newly discovered evidence, if true, showed the original evidence as to a disclosure was shockingly false and a fraud upon the courts. It remanded to see where the truth lay, saying, "The integrity of the judicial process demands no less."

The Court perceived the stern dilemma (355 U. S. at 242) that either the original testimony in the District Court was untrue or the affidavits tendered to this Court themselves were the product of fraud.

The courts below, perhaps because not familiar with the processes by which this Court had been induced to hold the case while the witnesses were pursued, or perhaps because unappreciative of how lacking in candor the presentation to this Court had been, did not face up to the unpleasant dilemma. Judge Nordbye nevertheless found there were "glaring inconsistencies and contradictions * * * in the testimony of Huebner, Graflund and Lima in the light of their prior statements and their testimony before the Grand Jury" (P. 52, *infra*). However, he did not "believe that any Government official has attempted to have any witness herein testify falsely" (App. 1769). This, if correct,[10] does not meet the problem. If there is any principle fundamental to our system of criminal law, it is that a public prosecutor must exhibit utmost candor to the court, and to the defendants and is not permitted to conceal or suppress relevant material evidence helpful to the defendants. His duty is not to win cases but to see that justice is done. *Berger* v. *U. S.*, 295 U. S. 78.

Canon 5 of the Canons of Professional Ethics condenses in unmistakable language the holdings of many cases:

10. Judge Nordbye's conclusion is difficult to accept because the final lurid and untrue charges made to this Court were too dramatic and the various parts of the story fit together too well, and too completely, to be the result of unrelated mistakes of memory by the witnesses.

> "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible." (62 Am. Bar Rpts. 1106.)

It applies to all who worked on the case. Here, most important relevant evidence was suppressed. For example, solemn, sworn testimony that was capable of establishing, and that ultimately did establish, that Busby was innocent of perjury and told the truth when he testified that Graflund revealed the facts to him in January 1948, was ruthlessly suppressed, and the claim was advanced that Busby was guilty of perjury.

We doubt that the Solicitor General, who presented the applications to this Court, was aware of what had been suppressed, but regardless of who ma have been at fault, the overriding fact is that this Court was imposed on. We submit it is the duty of the Department to explain, if it can, why this Court was not frankly told the full and true facts.

What was done here, although more refined and sophisticated than the conduct of the police officers in *McNabb* v. *U. S.*, 318 U. S. 332, who questioned suspects until they got all of the "discrepancies" in their stories satisfactorily worked out, was not essentially different in kind and was worse in degree because it involved lack of candor to this high court.

The Court of Appeals opinion says that the District Court on remand considered relevant testimony of the defendants untrue and in effect absolved the affidavits of Huebner and Graflund of the charge of fraud. As to this, three observations may be made: (1) The testimony of *defendants* which the District Court considered untrue *was their testimony as to the merits of the tax case.* The *District Court* made no finding that the testimony in which this

Court was interested, *i. e.*, that of Sauber, Busby and defendant Cain with respect to the time and the manner of the making of the disclosure, was untrue. As to the merits there can be no doubt defendants were entitled to a jury trial. (2) We do not think it can fairly be said that "in effect" the District Court absolved the affidavits of Huebner and Graflund of the charge of fraud, for in finding that Graflund did in fact reveal the black market facts to Busby in January 1948; the District Court found that the core of the Graflund affidavit to this Court was *false*. Likewise, large portions of Huebner's affidavit, and his testimony on remand, were rejected by the District Court, and Huebner's failure to support his crucial charge to this Court that he had tried to tell the truth on the original hearing but had been kept off the stand, was ignored. (3) In any event, so serious a matter should not be disposed of by an opinion which must be construed to find what "in effect" it holds and that is particularly true where this Court has gone to the pains of cataloging the charges to be answered.

Only after endless interrogations, "refresher courses", lie detector tests, and the obvious possibilities of new indictments from a new grand jury, the witnesses changed their stories to those ultimately laid before this Court.

The same integrity of the judicial process which required the remand now requires that the case be further reviewed to protect the processes of this Court.

Had this Court frankly been told, as the fact was in October 1956, that Graflund had been interviewed repeatedly and fully supported Busby's testimony as to the genesis of the disclosure; that Lima had been interviewed repeatedly and disclaimed any knowledge of an alleged $20,000 settlement or of making and destroying a Revenue Agent's report; that the only witness the prosecutors had was Huebner who confessed he had been an accomplice of Lubben, had received some $45,000 of money personally

and was trying to make the other two defendants share the blame, we think it is manifest that the motion to remand would have been denied out of hand. In any event, the Court was entitled to candor and did not get it.

In *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115, 124, this Court said:

> "The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts."

That case, as well as *Mesarosh* v. *U. S.*, 352 U. S. 1, was relied upon by this Court in its remanding opinion here. The turn of events has shown that the administration of justice was "tainted" in the very proceeding purportedly brought to "cleanse the record."

We realize the seriousness of our presentation. It arises from the record and will be documented in much greater detail if the writ be allowed. The issue is so basic to the fair administration of criminal justice that the present petition should not be opposed by the Government, for it should be as interested as citizens in seeing that criminal justice in the highest court of the land is not tainted by false affidavits, and by the withholding of relevant evidence, so that prosecutors may have a further go at witnesses. If such things be condoned here it is a certainty that the standards of inferior courts will be lowered.

3.

The trial court found that Lubben's testimony on which the jury convictions depended, had been seriously false. There was no more important issue before the jury than that as to the gross amount of Lubben's payments, because unless defendants could establish that they had expended a like amount for raw materials, they were bound to be convicted.

On the jury trial the Government contended that Lubben's testimony (and books) proved a total of $454,000 (R. 1837-50). Because, *as now found*, that figure was seriously "exaggerated" defendants could not possibly show they spent that much for raw materials. On the remanded hearing Government witness Huebner flatly said that Lubben had "lied on the stand" when before the jury (App. 809); that Lubben lied when he testified he paid Graflund some $49,000 (App. 809); that one item (chocolate covered nuts) on which Lubben claimed he had paid $40,000 in "overages" had borne no "overages" at all. The new evidence, taking everything Huebner testified to at face value, is that Lubben paid only $234,000. That was the figure asserted by the prosecutors to Judge Nordbye. That is $220,000 less than what Lubben told the trial jury.

It was established, without contradiction on the new hearing, that Lubben's purported records which went to the jury had been "doctored" (App. 969) by one Tobias, who then became a Treasury employee.

Judge Nordbye found it was "entirely probable that Lubben exaggerated his testimony when before the jury" (App. 1758); that the probable amount which Lubben had paid, including $28,000 in the year 1944 which was not involved in the jury trial, was "between three and four hundred thousand dollars" (App. 1758). This means, even on the District Court's figures, that Lubben lied to the jury to the extent of at least $132,000—we think much more (See p. 12, *infra*). It is manifest that the jury verdicts are "tainted" by "tainted" evidence.

In 1953 the District Court described Lubben as "honest" and "faithful" and found that "*twelve jurors believed he told the truth*" (R. 3073). In 1959 he no longer could find that Lubben had been honest but perhaps "mistaken"; he found Lubben had "exaggerated".[11] We suggest that verbiage is a mere euphemism for perjury; *in any event*

it is a finding that the jury was grossly misled by seriously false and vital testimony. In this respect this case is the precise reverse of *U. S.* v. *Johnson*, 327 U. S. 106, referred to by the Court of Appeals, in which the trial court found that the Government's star witness had told the truth to the jury. It is a monstrous perversion of due process to say that the Government may open a case up, prove that its star witness deceived a jury and yet insist that the question of credibility was for the jury which never had the benefit of the evidence which proved how it had been deceived.

We suggest that the Court of Appeals' holding that unless there be a formal finding of technical perjury, a federal judge may enter sentences on jury verdicts which he has found to be based on outrageously false testimony which the jury nevertheless accepted as true, is destructive of the standards of decency in criminal law enforcement that this Court has always insisted on. The holding is especially incongruous coming in a case in which this Court was deeply concerned with the integrity of federal criminal processes.

The Court of Appeals' holding that there must be a specific finding of technical perjury is legally immaterial under the doctrine of this Court in *Mesarosh* v. *U. S.*, 352 U. S. 1. *Mesarosh* stands for the proposition that a conviction resting upon the testimony of a proven falsifier cannot stand. In that case, when it was suggested that the Government's star witness had given false testimony before other tribunals, which the Solicitor General was not prepared to say constituted legal perjury because possibly

11. Lubben has been well documented as a congenital perjurer and swindler. The United States Attorney for the Southern District of New York describes him as "a perjurer and a blackmarketeer and practically anything else you want to talk about" (R. 2589 of *Giglio* v. *U. S.*, 355 U. S. 339). *In re Carlsen*, 17 N. J. 338, 111 A. 2d 393, shows him in a distillery swindle in Puerto Rico in 1951. *State* v. *Weleck*, 34 N. J. Super. 267, 112 A. 2d 23, 25, again proves his penchant for perjury.

caused by a psychiatric condition of the witness, this Court granted a new trial, saying (352 U. S. at p. 9):

> "The question of whether his [Mazzei] untruthfulness in these other proceedings constituted perjury, or was caused by a psychiatric condition, can make no material difference here. Whichever explanation might be found to be correct in this regard, Mazzei's credibility has been wholly discredited by the disclosures of the Solicitor General. No other conclusion is possible. The dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tainted and there can be no other just result than to accord petitioners a new trial."

At p. 14 this Court said:

> "Mazzei, by his testimony, has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity. This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity."

In *Mesarosh* the Solicitor General, on the basis of false testimony *in other cases*, thought there was a possibility of false testimony in the criminal proceeding. Here we have a judicial finding of *false testimony in the criminal case itself.*"

To paraphrase this Court in the *Mesarosh* case, these petitioners were convicted by the tainted testimony of Lubbon; the pollution caused by the tainted testimony can be cleansed only by granting a new trial.

In *Communist Party v. Subversive Activities Control Board*, 351 U. S. 115, this Court said at p. 124:

> "When an uncontested challenge is made that a find-

ing of subversive design was in part the product of three perjurious witnesses it does not remove the taint for a reviewing court to find there was ample innocent testimony to support the Board's findings."

In both, *Mesarosh* and *Communist Party*, this Court cited *McNabb* v. *U. S.*, 318 U. S. 332, where the Court said (p. 340), "Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence."

This Court has held it to be a denial of due process for a state to obtain a conviction by the knowing use of perjury. *Mooney* v. *Holohan*, 294 U. S. 103. In *Napue* v. *Illinois*, 360 U. S. 264, 269, it said, "The same result obtains, when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." False evidence here appeared before sentencing. The record should have been cleansed of that impurity before a jury which heard truth, not lies.

The District Court applied a double standard: He resentenced petitioners, although he did not find that they had committed any perjury in the first disclosure hearing, but ignored the fact that the evidence to sustain the conviction rests on the testimony of a witness he found to be a falsifier.

We suggest that in responding to this petition it will be the duty of the Department of Justice to say whether it approves sending citizens to the penitentiary on known false evidence.

4.

There can be little doubt that both the grand and petit juries were illegal:

The duties of a Jury Commissioner "may not be delegated" (*Glasser* v. *U. S.*, 315 U. S. 60, 85; *U. S.* v. *Murphy*,

224 Fed. 554, D. C. N. Y.; *In re Petition for Special Grand Jury*, 50 F. 2d 973, D. C. Pa.). The seriousness of that rule is demonstrated by *Dunn* v. *U. S.*, 5 Cir., 238 Fed. 508, in which, at a time when the statute authorized only the Clerk of the Court and the Jury Commissioner to select jurors, a Deputy Clerk had performed the Clerk's functions. Solely because of the delegation a conviction was set aside. It was necessary to have the statute amended to its present form, which permits a Deputy Clerk to exercise the duty of selection in large districts (See House Rpt. No. 1322, 64th Cong., 2nd Sess.).

Judge Nordbye erroneously held that the Commissioner delegated merely ministerial duties to Jongsma. In the Court of Appeals we challenged the Government to show any evidence that would support that finding. Unable to do so, it ignored the challenge and the Court of Appeals ignored the point. Court should not feel at liberty to ignore incontestable proof that a Congressional mandate that the Jury Commissioner alone select prospective jurors has been violated. The Solicitor General should concur with us on this point, but if he files a Brief in Opposition, he will be unable to cite any substantial evidence showing that Commissioner Crooks selected a single one of the jurors theoretically selected by him. The juries, as a matter of law, therefore, were illegal. We suggest it is obvious that this Court should use its supervisory powers to see that mandatory provisions as to who may select jurors be not set at naught.

The Clerk of the Court and the Jury Commissioner were under an affirmative duty to select jurors constituting a cross section of the population. Yet 39% of the grand jurors were "volunteers" and another 30% had been recommended by former grand jurors. Such a group could not remotely constitute a cross section of the population. The jury was substantially a volunteered and self-

perpetuated group. 39% of the population does not wish to serve on juries. Courts have trouble getting jurors. The minute one finds a jury in which 39% of the members sought the position, one knows it is a group which is far from a true cross section.

At the time the jurors were selected the federal statute required that the jurors be competent as jurors under the law of Illinois. The Illinois law completely precluded volunteers by requiring that jurors be selected from voting lists and by making the act of volunteering a disqualification. All of the jurors who were volunteers thus were incompetent.

Finally, the leading case of *Glasser* v. *U. S.*, 315 U. S. 60, which arose from the Northern District of Illinois, flatly forbade the use of any private lists and specifically the membership list of the Illinois League of Women Voters, as a source for jury names. Nevertheless the Clerk of the Court continued to use that very list. One regular and one alternate member of the petit jury came from it. Another member came from the Illinois Opera Guild membership list. Decisions of this Court endeavoring to guide jury selection procedures will do little good if flagrant nonobservance of them is tolerated.

The trial judge took the position that because defendants could not show that some specific race or class was singled out for exclusion that the jury was satisfactory. That view misses entirely the bigger question—the process of selection used was in no way calculated to produce a cross section of the population. It could not, and did not, do so. Unless one's name was on one of the lists used by the Clerk or one was nominated by a former juror one had no actual chance of being selected for the Clerk's half of the names which went into the wheel.

The Court of Appeals' opinion handles the matter in per-

emptory fashion by ignoring the point as to the illegal activities of Richard Jongsma, by ignoring the binding Illinois law that made volunteers incompetent, and finally by saying that petitioners failed to show they were "actually prejudiced by the method by which jurors were selected" (p. 63, *infra*). In so doing the Court of Appeals ruled squarely contrary to this Court's holding in *Ballard* v. *U. S.*, 329 U. S. 187, 195:

> "But *reversible error does not depend on a showing of prejudice in an individual case.* • • • The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." (Italics ours.)

The Court overlooked also that this Court ruled in *Glasser* v. *U. S.*, 315 U. S. 60, 86:

> "Tendencies, no matter how *slight*, toward the selection of jurors *by any method other than a process which will insure* a trial by a *representative* group are undermining processes weakening the institution of jury trial, and *should be sturdily resisted.*" (Italics ours.)

5.

The errors of the District Court in admitting evidence obtained under promises of immunity were continued into the instructions which the Court gave the original jury. Much evidence was received with the limitation that it did not apply to the defendant Sullivan, yet the jury was instructed to consider that evidence with respect to him. Finally there remains the perplexing question noted by footnote 3 of the majority opinion and by Justice Black's dissent when the case was first here: whether defendants' alleged admissions had been properly obtained, was correctly taken from the jury when the jury in effect was

told that defendants had not acted in good faith because their disclosure had not given them immunity. The jury was precluded from any investigation of the issue. (Cf. Meltzer *Involuntary Confessions; the Allocation of Responsibility Between Judge and Jury*, 21 U. Chi. L. Rev. 317.)

CONCLUSION.

This case now raises far more serious questions than originally were presented, for the new hearing showed that petitioners were originally convicted by false evidence. The question of basing convictions upon incriminating evidence obtained by promises of immunity not only remains but has been placed in such aggravated focus that it should be settled by this Court.

All of the reasons of protecting fairness, decency and integrity in federal criminal processes that originally moved this Court to act now should impel the Court to review the case in the light of the disturbing revelations of the remanded hearing, and the Court of Appeals' reversal of its original position on the constitutional issues.

Respectfully submitted,

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